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No. 03-9877

In The

Supreme Court of the United States

JON B. CUTTER, *et al.*,

Petitioners,

v.

RICHARD WILKINSON, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
For the Sixth Circuit

Brief of *Amicus Curiae* The Claremont Institute Center for Constitutional Jurisprudence In Support of Respondents

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QUESTION PRESENTED

1. Whether Congress exceeded its constitutional powers when it mandated, via the Religious Land Use and Institutionalized Persons Act of 2000, broad religious accommodations for state prisoners as a condition on federal spending for local, as opposed to general or national, prison systems?

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Brief of *Amicus Curiae* The Claremont Institute
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INTEREST OF *AMICUS CURIAE*[1]

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a non-profit educational foundation whose stated mission is to "restore the principles of the American Founding to their rightful and preeminent author-

[1] The Claremont Institute Center for Constitutional Jurisprudence files this brief with the consent of all parties. The letters granting consent have been previously filed or are being filed concurrently. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution specifically for the preparation or submission of this brief.

ity in our national life," including the principles, at issue in this case, that the Establishment Clause does not prohibit the federal government from accommodating the religious beliefs of its citizens but that the Spending Clause limits federal spending to matters of national or general concern as opposed to purely local concern. The Institute pursues its mission through academic research, publications, scholarly conferences and, via its Center for Constitutional Jurisprudence, the selective appearance as *amicus curiae* in cases of constitutional significance. The Institute and its affiliated scholars have published a number of books and monographs of particular relevance here, including John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63 (2001); HARRY V. JAFFA, EQUALITY AND LIBERTY: THEORY AND PRACTICE IN AMERICAN POLITICS (1965); HARRY V. JAFFA, CONDITIONS OF FREEDOM: ESSAYS IN POLITICAL PHILOSOPHY (1999); WILLIAM J. BENNETT, OUR SACRED HONOR (1997); Larry P. Arnn and Douglas A. Jeffrey, *"We Pledge Allegiance"—American Christians and Patriotic Citizenship*; DANIEL C. PALM, ED., ON FAITH AND FREE GOVERNMENT (1997); and John C. Eastman, *"We Are A Religious People Whose Institutions Presuppose A Supreme Being,"* 5 NEXUS: J. OPINION 13 (Fall 2000).

The Claremont Institute Center for Constitutional Jurisprudence, which is the public interest law unit of the Institute, has participated as *amicus curiae* before this Court in several cases addressing similar issues, including *Van Orden* v. *Perry*, No. 03-1500 (U.S., pending); *Elk Grove Unified Sch. Dist.* v. *Newdow*, 124 S.Ct. 2301 (2004); *Zelman* v. *Simmons-Harris*, 536 U.S. 639 (2002); *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001); *Schaffer* v. *O'Neill*, 534 U.S. 992 (2001); and *United States* v. *Morrison*, 529 U.S. 598 (2000).

STATEMENT OF THE CASE

The three appellants are prisoners in the state of Ohio. They contended, *inter alia*, that various officials with the Ohio Department of Rehabilitation ("Ohio") violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5. *Cutter* v. *Wilkinson*, 349 F.3d 257, 259 (CA6 2003). Ohio's motion to dismiss on grounds that the RLUIPA provisions dealing with institutionalized persons were facially unconstitutional as exceeding Congress's Spending Clause authority and contravening the Establishment Clause, was denied by the District Court. *Id.*, at 261. On interlocutory appeal, the Sixth Circuit held that RLUIPA's institutionalized persons provisions were facially unconstitutional under the Establishment Clause because RLUIPA's purpose was to "advance religion in prisons relative to other constitutionally protected conduct" and because RLUIPA had the effect of advancing religion by inducing prisoners will become religious in order to benefit from the stricter standard of review mandated by RLUIPA. *Id.*, at 264-65. The court acknowledged but did not reach Ohio's Spending Clause contention. *Id.*, at 259, 269.

SUMMARY OF ARGUMENT

The holding below that RLUIPA amounts to an unconstitutional Establishment of religion cannot be squared with this Court's religious accommodation jurisprudence. But Ohio's alternate contention below, that the institutionalized persons provisions of RLUIPA exceeded Congress's authority under the Spending Clause, has merit.

Following *United States* v. *Lopez*, 514 U.S. 549 (1995), in which this Court resurrected some of the limits on Congress's Commerce Clause power that were critical to the Founders' constitutional design, the Spending Clause appears to have become Congress's new regulatory vehicle of choice because of the overly broad interpretation of the Clause that

has been sanctioned by this Court. In the New Deal-era case of *United States* v. *Butler*, 297 U.S. 1, 66 (1936), this Court embraced an interpretation of the Spending Clause that affords to Congress almost unlimited power to spend taxpayer monies on whatever it deems beneficial. And in *South Dakota v. Dole*, 483 U.S. 203 (1987), this Court sanctioned an equally broad assertion of power by Congress to attach conditions on its spending programs in order to regulate beyond what its enumerated powers would otherwise permit. As a result, Madison's prophetic warning of a Government "without any limits at all" has come to pass, and we see daily a ubiquitous Federal government enacting, under the guise of the Spending Clause, laws and regulations in areas that the Constitution left to each State's innate police powers. If left unchecked, the expansive claims of power that have been asserted by Congress under the Spending Clause will render this Court's landmark decision in *Lopez* a nullity. This case affords an opportunity for this Court to begin to re-think the expansive and erroneous interpretation of the Spending Clause first suggested in *Butler*.

ARGUMENT

I. RLUIPA's Accommodation of Prisoners' Exercise of Religion Does Not Violate The Establishment Clause.

This *amicus curiae* agrees with the contention of Petitioners and their *amici* that RLUIPA does not violate the Establishment Clause. It is both well-settled and correct as an original matter that the government does not violate the Establishment Clause when it merely accommodates the religious faith of its citizens. *See, e.g., Corporation of Presiding Bishops of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 338 (1987) (holding that applying religious exemption to Title VII's prohibition against religious discrimination in employment to secular nonprofit activities of religious organization did not violate the Establishment Clause.); *Walz v. Tax Commission of of City of New York*, 397 U.S. 664, 673

(1970) (holding that New York's exempting of real property tax realty owned by religious organization did not establish religion, it "simply spar[ed] the exercise of religion from the burden of property taxation levied on private profit institutions"). The Establishment Clause, even as currently interpreted, allows the "government some latitude in recognizing and accommodating the central role religion plays in our society" because "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." *County of Allegheny v. ACLU,* 492 U.S. 573, 657 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part).

Moreover, religious accommodations, and even overt acknowledgements, were commonplace at the time the First Amendment was drafted and ratified, both at the state and federal level. The first Congress, for example, saw no conflict between the Establishment Clause and the Northwest Ordinance, which served as the charter of government for the territories northwest of the Ohio River (the present states of Ohio, Indiana, Illinois, Michigan and Wisconsin). The Ordinance included the following provision supporting the teaching of religion in public schools: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." *An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio*, Art. 3, 1 Stat. 50, 51 n. a (July 13, 1787, re-adopted Aug. 7, 1789). Although the ordinance was initially passed in the summer of 1787 before the Constitution itself was adopted and ratified, it was re-adopted by the first Congress—the same Congress that approved the First Amendment and sent it (along with the remainder of the Bill of Rights) to the States for ratification. *Id.* Significantly, Congress changed certain provisions to "adapt the [ordinance] to the present Constitution," *id.*, at 51, but it left the religion clause intact.

Other public pronouncements at the time routinely acknowledged God. In his first official Act as President, for example, George Washington prayed that the "Almighty Being who rules over the universe" would "consecrate" the government formed by the people of the United States. George Washington, *First Inaugural Address* (April 30, 1789), *reprinted in* WILLIAM B. ALLEN, ED., GEORGE WASHINGTON: A COLLECTION 460-61 (1988). And his proclamation of a day of thanksgiving, which we still celebrate, is an elegant national prayer, requested by the very Congress that drafted the Establishment Clause of the First Amendment:

> Whereas it is the duty of all Nations to acknowledge the providence of Almighty God, to obey his will, to be grateful for his benefits, and humbly to implore his protection and favor, and Whereas both Houses of Congress have by their joint Committee requested me "to recommend to the People of the United States a day of public thanks-giving and prayer to be observed by acknowledging with grateful hearts the many signal favors of Almighty God, especially by affording them an opportunity peaceable to establish a form of government for their safety and happiness.
>
> Now therefore I do recommend and assign Thursday the 26th day of November next to be devoted by the People of these States to the service of that great and glorious Being, who is the beneficient Author of all the good that was, that is, or that will be. That we may then all unite in rendering unto him our sincere and humble thanks, for his kind care and protection of the People of this country previous to their becoming a Nation, for the signal and manifold mercies, and the favorable interpositions of his providence, which we experienced in the course and conclusion of the late ware, for the great degree of tranquility, union, and plenty, which we have since

> enjoyed, for the peaceable and rational manner in which we have been enabled to establish constitutions of government for our safety and happiness, and particularly the national One now lately instituted, for the civil and religious liberty with which we are blessed, and the means we have of acquiring and diffusing useful knowledge and in general for all the great and various favors which he hath been pleased to confer upon us.
>
> And also that we may then unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations and beseech him to pardon our national and other transgressions, to enable us all, whether in public or private stations, to perform our several and relative duties properly and punctually, to render our national government a blessing to all the People, by constantly being a government of wise, just and constitutional laws, discreetly and faithfully executed and obeyed, to protect and guide all Sovereigns and Nations (especially such as have shown kindness unto us) and to bless them with good government, peace, and concord. To promote the knowledge and practice of true religion and virtue, and the encrease of science among them and Us, and generally to grant unto all Mankind such a degree of temporal prosperity as he alone knows to be best.

George Washington, *Thanksgiving Proclamation* (Oct. 3, 1789), reprinted in GEORGE WASHINGTON: A COLLECTION, *supra*, at 534-35.

Even Thomas Jefferson, the patron saint of the separation of church and state movement, began the Virginia Statute for Religious Freedom by invoking "Almighty God, "the Holy author of our religion," the "Lord of body and mind." *A Bill for Establishing Religious Freedom*, reprinted in Thomas Jefferson, Writings, 346 (Merrill Peterson, ed., Library of

America 1984). Under today's expanded interpretation of the Establishment Clause, all of these references to God would constitute an unconstitutional establishment of religion by the very people who drafted and ratified the actual Establishment Clause, yet even today's interpretation does not go so far as to prevent government from accommodating the religious free exercise of private citizens.

These founding era public affirmations of God and religion are not at all uncharacteristic or surprising, for the Founders believed that a virtuous citizenry was both a precondition for republican government and a continuing necessity for its perpetuation. The Declaration of Rights affixed to the beginning of the Virginia Constitution of 1776, for example, provides "[t]hat no free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles." Va. Const. of 1776, Bill of Rights, Sec.15, *reprinted in* FRANCIS NEWTON THORPE, 7 THE FEDERAL AND STATE CONSTITUTIONS 3812, 3814 (1993) (1909) ("Thorpe"). The Massachusetts Constitution of 1780 echoes the sentiment: "[T]he happiness of a people, and the good order and preservation of civil government, essentially depend upon piety, religion, and morality . . . ." Mass. Const. of 1780, Pt. 1, Art. 3, *reprinted in* 3 THORPE 1888, 1889. The Pennsylvania Constitution of 1776 went even further, asserting:

> Laws for the encouragement of virtue, and prevention of vice and immorality, shall be made and constantly kept in force, and provision shall be made for their due execution. And all religious societies or bodies of men heretofore united or incorporated for the advancement of religion or learning . . . shall be encouraged . . . .

Pa. Const. of 1776, Art. II, § 45, *reprinted in* 5 Thorpe 3081, 3091.

But perhaps the clearest example of the Founders' views was penned by James Madison, writing as Publius in the 55th number of The Federalist Papers: "Republican government presupposes the existence of [virtue] in a higher degree than any other form. Were [people as depraved as some opponents of the Constitution say they are,] the inference would be that there is not sufficient virtue among men for self-government; and that nothing less than the chains of despotism can restrain them from destroying and devouring one another." The Federalist No. 55, at 346 (Clinton Rossiter, ed., 1961).

Although some of the passages just recited speak primarily of virtue and morality rather than religion itself, the fostering of virtue was, for the Founders, a task intimately tied to religion. As President Washington noted in his Farewell Address, "reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle." George Washington, *Farewell Address,* reprinted in GEORGE WASHINGTON: A COLLECTION, *supra,* at 521.

In sum, the Founders thought religion and virtue were both necessary to the perpetuation of republican institutions, and that it was the duty of government to foster such religious virtue in the citizenry. The Establishment Clause barred the federal government from providing tax support to one religious sect to the exclusion of all others, or from mandating adherence to such a nationally "established" religion, but it did not prohibit the federal government from providing aid to religion generally, or even from issuing public nonsectarian religious proclamations. Necessarily, then, mere accommodation of private religious exercise was perfectly constitutional.

Supreme Court Justice William O. Douglas acknowledged the Founders' views when, in the 1952 case of *Zorach* v. *Clauson*, he wrote: "We are a religious people, whose institutions presuppose a Supreme Being." 343 U.S. 306, 313 (1952). The very legitimacy of government by consent is based on the self-evident truth articulated in the

based on the self-evident truth articulated in the Declaration of Independence (by Thomas Jefferson, no less) that all men, all human beings, "are *created* equal." Decl. of Independence, para. 2, 1 Stat. 1 (1776) (emphasis added). And the very idea that people have rights that precede and are superior to government is based on the claim in the Declaration of Independence that human beings "are endowed, *by their Creator*, with certain unalienable rights," including the rights to life, liberty, and the pursuit of happiness. *Id.* (emphasis added). This is our national creed, and it is odd indeed that we have interpreted the Establishment Clause to bar government from accommodating those who would follow its lights.

Thus, the better interpretation of the Establishment Clause, one which prevailed throughout most of our nation's history, is that the Government moves from permissible accommodation to impermissible establishment only when it attempts to coerce religious participation or otherwise puts its "weight behind obvious efforts to proselytize on behalf of a particular religion." *Allegheny County*, 505 U.S., at 660-61 (Kennedy, J., concurring in the judgment in part and dissenting in part). As Justice Kennedy noted in *Allegheny County*, barring governmental coercion "goes far toward the attainment of [the] object [of the Establishment Clause]." *Id.*, at 660; *see also Lee* v. *Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) ("The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*" (emphasis in original)).

Under this original, anti-coercion understanding of the Establishment Clause, it is clear that RLUIPA is a permissible accommodation rather than an impermissible establishment of religion. RLUIPA does not attempt to coerce prisoners into practicing religion; it does not penalize prisoners for not being religious; and it does not put the government's weight behind any effort to proselytize. Rather, it merely

attempts to accommodate prisoners' religious beliefs by ensuring that no government will enact any law that substantially burdens the exercise of a prisoner's religion unless it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). That this heightened scrutiny provides a greater accommodation for religion than is required by the Free Exercise Clause does not turn RLUIPA into an unconstitutional establishment. There is "ample room" between what the Free Exercise Clause mandates and what the Establishment Clause forbids, *Amos*, 483 U.S., at 334, and this accommodation easily fits within that window. Were this Court to hold otherwise, a host of previously-approved accommodations would be unconstitutional establishments. *See, e.g., Amos*, 483 U.S., at 338 (upholding religious exemption in Title VII); *Walz*, 397 U.S., at 673 (upholding state tax exemption for religious organizations); *Zorach*, 343 U.S., at 684 (upholding release time program, noting: "When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions"); *see also, e.g.*, 21 CFR § 1307.31 (1993) ("The listing of peyote as a controlled substance ... does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church"); 25 CFR § 11.87H (1993) ("[I]t shall not be unlawful for any member of the Native American Church to transport into Navajo country, buy, sell, possess, or use peyote in any form in connection with the religious practices, sacraments or services of the Native American Church"); Dept. of Air Force, Reg. 35-10, ¶ 2- 28(b)(2) (Apr. 1989) ("Religious head coverings are authorized for wear while in uniform when military headgear is not authorized"); National Prohibition Act, § 3, 41 Stat. 308 ("Liquor for nonbeverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported,

exported, delivered, furnished and possessed"), repealed by Liquor Law Repeal and Enforcement Act, § 1, 49 Stat. 872; *see generally*, Michael McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1 (1985); Michael McConnell, *Accommodation of Religion: An Update and a Response to the Critics*, 60 GEO. WASH. L. REV. 685 (1992).

II. The Appropriations to Which RLUIPA Was Attached Exceeded Congress's Power Under the Spending Clause.

Concluding that RLUIPA does not violate the Establishment Clause is not the end of the constitutional inquiry, of course, as Congress must still find authority for RLUIPA's enactment in some enumerated power. Congress enacted RLUIPA ostensibly in reliance on its power to raise taxes "to provide . . . for the general welfare of the United States"—the Spending Clause. U.S. Const. Art 1, § 8, cl. 1. More precisely, Congress enacted RLUIPA as a condition on a previously-enacted *federal* program of spending for *state* prison systems. Accordingly, this Court must first determine whether the federal government's state prison spending program is permissible under the Spending Clause and, if it does, then determine whether RLUIPA meets the test for valid conditions on that spending, established by this Court in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). For the reasons set out below, RLUIPA does not get over the first hurdle.[2]

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[2] Because Congress has not relied on its authority under Section 5 of the Fourteenth Amendment, we do not address whether RLUIPA would be a permissible exercise of that power, but merely note that widespread erection of barriers by State governments to the free exercise of religion might well suffice under this Court's decision in *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), to sustain RLUIPA pursuant to Congress's Section 5 authority. Nor do we address whether RLUIPA's land use provisions are a valid exercise of Congress's Commerce Clause authority.

A. The Historical Understanding of the Spending Clause.

Article I, Section 8, Clause 1 of the Constitution provides that "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, Excises shall be uniform throughout the United States." U.S. Const. art. I, § 8, cl. 1. On its face, the clause allows Congress to levy taxes only for two purposes: 1) to pay the debts of the United States; and 2) to provide for the common defense and general welfare of the United States. Yet to the modern eye, those two purposes are so broad as to amount to no limitation at all. Indeed, the contemporary view is that the power to provide for the "general welfare" grants Congress the ability to spend for anything it views as beneficial in some way, even if beneficial only to a small segment of the population or to a single locale. *See, e.g.*, Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 93 (2001) ("It is hard to imagine a broader statement of the scope of Congress's powers" than the "common defence" and "general welfare" language of the Spending Clause).

Such was not the view of those who drafted and ratified the Constitution, nor the view which prevailed in the political branches of government for the first half century of our nation's history, nor the view which prevailed in this Court until after its New Deal-era decision in *United States* v. *Butler*. Madison and Jefferson, for example, believed that the authority to spend for the "general Welfare" was merely a shorthand permission for Congress to spend taxpayer funds to further the powers enumerated elsewhere in Article I, Section 8. *See, e.g.*, Federalist 41, pp. 263-64 (Madison) (Rossiter, ed., 1961); James Madison, Debate on the Cod Fishery Bill, 3 *Annals of Congress*, House of Representatives, 2nd Congress, 1st Session 386-87 (1792); Thomas Jefferson, Opinion on the Constitutionality of the National Bank, (Feb. 15,

1791), *reprinted in* THOMAS JEFFERSON, WRITINGS 416, 418 (Merrill D. Peterson, ed., Library of America 1984). Even Alexander Hamilton, who adhered to the broader view that the Spending Clause was a separate grant of power unconfined by the other power enumerated in Article I, Section 8, believed the clause authorized spending *only* for the general or national welfare and not for the special welfare of particular regions or states. Alexander Hamilton, Report on Manufactures, Dec. 5, 1791, *reprinted in* 2 FOUNDERS CONSTITUTION 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987).

From 1800 to 1860, almost every President held to the view that the Spending Clause was limited, either by its own text or by the enumeration of powers which followed. In the closing days of his second term as President, for example, Madison vetoed an internal improvements bill that would have funded the construction of roads and canals "in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defence." President James Madison, Veto Message, 32 ANNALS OF CONG. 211 (1817). Madison rejected the contention that the Spending Clause authorized such expenditures, stating that such a broad reading would render "the special and careful enumeration of powers, which follow the clause, nugatory and improper." *Id.*, at 212.

President James Monroe vetoed as unconstitutional a bill to preserve and repair the Cumberland road, noting in his veto message that Congress's power to spend was restricted "to purposes of common defence, and of general, national, not local, or state, benefit." President James Monroe, Veto Message, 46 ANNALS OF CONG. 1838, 1849 (May 1822). President Andrew Jackson vetoed as unconstitutional an effort by Congress to improve navigation of the Wabash River. He conceded that the improvements in the navigable portions of the river qualified as in the "general" or national welfare, but he deemed improvements above the point of navigability

to be an unconstitutional appropriation for local improvements rather than improvements in the general welfare. President Andrew Jackson, Veto Message, 28 H. R. Journal 28 (1834).

Presidents Tyler, Polk and Buchanan likewise vetoed internal improvements bills as an unconstitutional exercise of Congress's power under the Spending Clause. *See, e.g.*, President John Tyler, Veto Message, 39 H.R. Journal 1081 (June 11, 1844). President Buchanan took it as a given that the funds raised by Congress from taxation were "confined to the execution of the enumerated powers delegated to Congress." The idea that the resources of the federal government—either taxes or the public lands—could be diverted to carry into effect any measure of state domestic policy that Congress saw fit to support "would be to confer upon Congress a vast and irresponsible authority, utterly at war with the well-known jealousy of Federal power which prevailed at the formation of the Constitution." "The natural intendment" of those who drafted and ratified the Constitution, he continued,

> would be that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a Government has been created with all its other powers carefully limited, but without any limitation with respect to the public lands.

President James Buchanan, Veto Message, 55 H.R. Journal 506 (Feb. 26, 1859).

Most of the Founders, and most of the individuals who served in the office of President for the first half century of our nation's history, adhered to the Madisonian view regarding the Spending Clause's limits. But whether the Clause's limits are defined by the subsequent enumeration of powers

(Madison's position), or by the textual requirement that spending be for the "general" or national as opposed to local welfare (Hamilton's position), the view that the spending power was itself limited in some way is the only view compatible with the doctrines of enumerated powers and limited government.

The enumerated powers given to Congress in the rest of Article I, Section 8 were themselves limited to matters that required national rather than local legislation. For example, early in the constitutional convention, Roger Sherman proposed that Congress should have power to legislate "in all cases which may concern the *common interests* of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned." 2 MAX FARRAND, ED., THE RECORDS OF THE FEDERAL CONVENTION 21 (1911), (proposal by Roger Sherman, July 17, 1787) (emphasis added); *see also id.* (proposal of Gunning Bedford) (giving to Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent"). His proposal, and others like it, were referred to the Committee of Detail, which on August 6, 1787 gave substance to his proposal by reporting back a list of enumerated powers that was eventually to become Article I, Section 8—powers designed to further the common interests or general welfare of the nation without interfering unnecessarily with the internal police powers of the states. Thus, the limitations implicit in the very idea of the enumerated powers doctrine paralleled the "general welfare" limitation in the spending clause.

This Court sided with Hamilton in *United States* v. *Butler*, 297 U.S. 1, 66 (1936), of course, holding that "[w]hile . . . the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the legislative powers of the Con-

gress." *Id.*, at 65-66. In other words, though it rejected the long-standing Madisonian position, the Court nevertheless concluded that the "general welfare" clause imposed another limitation on Congress' spending power, namely, that the purpose of the spending "must be 'general, and not local.'" *Id.*, at 66-67; *see also id.*, at 87 (Stone, J., dissenting) ("The power to tax and spend is not without constitutional restraints. One restriction is that the purpose must be truly national"). The Court then invalidated the Agricultural Adjustment Act as exceeding that textual limit. *Id.*, at 68.

This Court in *South Dakota* v. *Dole* likewise recognized that "the general welfare" imposes a limitation on the Spending Power, 483 U.S., at 207, but it failed to appreciate that the text permits only spending on national rather than local programs instead of merely requiring that the spending "serve general public purposes." *Id.* The former, and correct, limitation is much more judicially enforceable than the latter, so it is no surprise that this Court, having adopted the latter interpretation, substantially deferred to Congress's judgment. *Id.* Such deference is less appropriate under the limitation actually contained in the text of the Clause. In other words, Justice O'Connor was correct in her dissenting opinion in the case: "If the spending power is to be limited only by Congress' notion of the general welfare, the reality . . . is that the Spending Clause gives 'power to the Congress . . . to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.' This, of course, . . . was not the Framers' plan and it is not the meaning of the Spending Clause." 483 U.S., at 217 (O'Connor, J., dissenting) (quoting *Butler*, 297 U.S., at 78). And such deference cannot be squared with this Court's more recent revival of the constitutional limits on Congress's enumerated powers in the analogous context of the Commerce Clause. *See United States* v. *Lopez*, 514 U.S. 549 (1995); *United States* v. *Morrison*; 529 U.S. 598 (2000); and *Solid Waste Agency of N. Cook Cty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159

(2001); *see also Ashcroft* v. *Raich*, 352 F.3d 1222 (CA9 2003), *cert. granted*, 124 S.Ct. 2909 (2004).

B. RLUIPA Exceeds Congress's Spending Clause Power Because the Appropriations to which it is Attached Were for Local, Not National, Prisons.

The spending program to which RLUIPA's conditions regarding institutionalized persons attached is clearly unconstitutional under the Madisonian view of the Spending Clause. *Federal* spending for state and local prisons is simply not among the enumerated powers delegated to Congress.

But even if this Court reaffirms its holding in *Butler* that Hamilton's view of the Spending Clause is the correct one, the federal appropriation to which RLUIPA's institutionalized persons provisions is attached exceeds Congress's Spending Clause power. Funding for state and local prisons is a quintessentially local, as opposed to national, appropriation. State prisons are set up to house those individuals who have committed against the people of the State crimes defined by the Legislature of the State. Housing these prisoners is clearly of primary benefit to the local rather than the national citizenry.

This Court has previously recognized the localized nature of prisons and prisoners. In *Preiser* v. *Rodriguez*, for example, Justice Brennan, writing for the Court, stated that "[i]t is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons." 411 U.S. 475, 491-92 (1973). Justice Brennan's difficulty in *Preiser* undermines any claim that the federal appropriations at issue here designed to further the national as opposed to local welfare.

CONCLUSION

The Establishment Clause reasoning of the Sixth Circuit should be rejected, but the decision of the Sixth Circuit should be affirmed on the alternate ground that the federal appropriation to which RLUIPA's institutionalized persons conditions is attached exceeds Congress's power under the Spending Clause.

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